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Supreme Court, U
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No. 97-819

In The

Supreme Court of the United States

October Term, 1997

BERNARDINE GREENE,

Petitioner,

vs.

ALAN GREENBERG, D.P.M., OPTIMUM PHYSICAL THERAPY CENTER, LISA TEN EYCK, P.T.,

Respondents.

On Petition for Writ of Certiorari to the New Jersey Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENTS OPTIMUM PHYSICAL THERAPY CENTER AND LISA TEN EYCK

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RULE 29.6 STATEMENT

Respondent Optimum Physical Therapy Center is no longer in existence.

STATEMENT OF THE CASE

The New Jersey Appellate Division's decision to dismiss petitioner's appeal is proper and does not warrant review by the Court.

After two and one half years of extensive motion practice, all of which was initiated by the petitioner, none of which addressed the merits of the case and most, if not all, of which was technically or procedurally deficient, the Appellate Division of the New Jersey Superior Court properly exercised its discretion and granted respondents' motion to dismiss petitioner's appeal.

The dismissal of petitioner's appeal did not violate petitioner's due process rights as the Appellate Division decision to dismiss was the result of the Appellate Divisions's correct interpretation and application of Appellate Division Rules. Thus, there is no basis to justify review by the United States Supreme Court.

ARGUMENT

PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED AS THE MATTER BEFORE THE COURT DOES NOT WARRANT REVIEW AS IT INVOLVES THE PROPER APPLICATION OF A STATE COURT RULE BY THE STATE COURT.

Petitioner seeks review of the New Jersey Appellate Division decision to dismiss her appeal which was granted based upon petitioner's failure to abide by New Jersey courts rules and for petitioner's failure to timely prosecute the appeal.

This saga commenced following a jury trial on petitioner's

medical malpractice action where the jury found in favor of respondents, Dr. Greenberg, Optimum Physical Therapy Center and physical therapist, Lisa Ten Eyck. Although the jury found that Dr. Greenberg was negligent, the jury also found that Dr. Greenberg's negligence did not proximately cause petitioner's damages. Not understanding that Dr. Greenberg's negligence could be unrelated to the causation of petitioner's alleged damages and convinced that this finding was against the weight of the evidence, the petitioner, as a *pro se* litigant, filed a Notice of Appeal on July 26, 1995.

Although New Jersey Court Rule 2:5-3(c) required petitioner to serve a complete copy of the trial transcript at the time of filing the Notice of Appeal, petitioner did not do so. Convinced that a complete copy of the trial transcript would mislead and confuse the Appellate Division, petitioner embarked on a two and one half year crusade filing motion after motion after motion with the New Jersey courts repeatedly requesting that she be permitted to serve an abbreviated trial transcript.[1] Although these motions were summarily denied, thus requiring petitioner to serve a complete copy of the trial transcript and proceed with the appeal, petitioner never served a complete copy of the trial transcript and never filed an appellate brief. The petitioner chose to continue her crusade regarding the trial transcript issue continuing to the time of respondents' motion to dismiss. Indeed petitioner set forth the need for an abbreviated trial transcript as a basis for the denial of respondents' motion to dismiss. Thus, even in the face of dismissal, petitioner refused to serve a complete copy of the trial transcript and never perfected her appeal by filing a brief.

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1. Not only was there no likelihood of success on each of these motions, most if not all of the motions were procedurally deficient as set forth in detail in respondent Dr. Greenberg's brief filed with this Court in opposition to petitioner's Writ of Certiorari.

Obviously agreeing with respondents' arguments that petitioner's crusade had gone on long enough and recognizing that petitioner repeatedly failed to abide by the technical requirements of the court rules, the Appellate Division dismissed petitioner's appeal. In dismissing petitioner's appeal, the Appellate Division exercised its right to control and police its docket as provided for in New Jersey Court Rules 2:8-2 and 2:9-9 and supported in New Jersey case law. *See Cherry Hill Dodge, Inc. v. Chrysler Credit Corp.*, 194 N.J. Super. 282, 283, 476 A.2d 860, 861 (App. Div. 1984); *State Highway Commission of the State of New Jersey v. Union Paving Company*, 33 N.J. Super. 85, 109 A.2d 424 (App. Div. 1954).

Thus, under the facts and circumstances of the instant action and following the guidelines set forth in Supreme Court Rule No. 10, there is no basis for the Supreme Court to review petitioner's claim. Specifically Supreme Court No. 10 provides:

> Review on a Writ of Certiorari is not a matter of right, but of limited judicial discretion. A petition for a Writ of Certiorari will only be granted for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
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> > . . . (b) a state court of last resort has decided an important federal question in a way that conflicts with another state court of last resort or of a United States Court of Appeals;
> >
> > (c) a state court or United States Court of Appeals has decided an important question of federal law that has not been,

> but should be settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

> A petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Petitioner's Writ should not be granted under the facts and circumstances of the instant matter where the Appellate Division properly applied a State court rule investing the Appellate Division with the discretion to dismiss appeals where petitioner repeatedly failed to abide by the court rules and petitioner never perfected her appeal throughout two and one half years of motion practice. Thus, petitioner's Writ of Certiorari should be denied as there is absolutely no basis justifying further review by this Court.

CONCLUSION

For the foregoing reasons, petitioner's Writ of Certiorari should be denied as there is no basis to review the Appellate Division decision to dismiss petitioner's appeal.

Respectfully submitted,

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